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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

OMAR GONZALEZ,

Defendant and Appellant.

B297531

(Los Angeles County
Super. Ct. No. VA143143)

APPEAL from an order of the Superior Court of
Los Angeles County. Roger T. Ito, Judge. Affirmed.

Melissa L. Camacho-Cheung, under appointment by the
Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief
Assistant Attorney General, Susan Sullivan Pithey, Assistant
Attorney General, Michael R. Johnson and Blythe J. Leszkay,
Deputy Attorneys General, for Plaintiff and Respondent.

Following his resentencing, Omar Gonzalez appeals the trial court's denial of his motion to vacate \$510 in fines and fees due to his claimed inability to pay. We affirm.

BACKGROUND

After Gonzalez assaulted his parents with a knife, he was convicted of three counts and sentenced to a second-strike term of nine years. On appeal, we reversed the finding of a strike and remanded for resentencing. (*People v. Gonzalez* (June 29, 2018, B283703) [nonpub. opn.] at p. 12.) At resentencing, the trial court dismissed the strike and imposed a term of eight years. It also imposed a \$300 restitution fine (Pen. Code, § 1202.4, subd. (b))¹; a \$120 court operations assessment (§ 1465.8); and a \$90 court facilities assessment (Gov. Code, § 70373). Gonzalez appealed.

While his appeal was pending, Gonzalez filed a motion in the trial court pursuant to section 1237.2,² requesting the court

¹ Undesignated statutory citations refer to the Penal Code.

² “An appeal may not be taken by the defendant from a judgment of conviction on the ground of an error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs unless the defendant first presents the claim in the trial court at the time of sentencing, or if the error is not discovered until after sentencing, the defendant first makes a motion for correction in the trial court, which may be made informally in writing. The trial court retains jurisdiction after a notice of appeal has been filed to correct any error in the imposition or calculation of fines, penalty assessments, surcharges, fees, or costs upon the defendant's request for correction. This section only applies in cases where the erroneous imposition or calculation of fines, penalty assessments, surcharges, fees, or costs are the sole issue on appeal.” (§ 1237.2.)

vacate his fees and stay his restitution fine due to his inability to pay. Alternatively, he requested an ability-to-pay hearing if the court determined there was insufficient information to decide the issue.

The motion was based on the recent decision in *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*), which held the trial court violated due process by imposing fines and fees without determining the defendant's ability to pay. To show he was unable to pay the \$510 in fines and fees, Gonzalez pointed out that before his conviction in 2017, he "was unemployed and living with his parents." He claimed when he was resentenced in 2019, he "was told that he could not work while in prison because he had to complete school work." His appointed appellate counsel submitted a declaration stating Gonzalez informed her "that he had a job in the kitchen but that it was taken from him so that he could complete his GED. He will not be allowed to work until his GED is complete."

In a minute order, the trial court stated it had "read and considered the motion to vacate fines and fees from the defendant, filed on 11-4-19. The motion is denied."

DISCUSSION

Gonzalez rests his argument on the constitutional due process issue addressed in *Dueñas*. Many courts since *Dueñas* have disagreed with its holding and reasoning, and this conflict is currently pending before our Supreme Court. (See *People v. Kopp* (2019) 38 Cal.App.5th 47, review granted Nov. 13, 2019, S257844 [granting review on two issues: "Must a court consider a defendant's ability to pay before imposing or executing fines, fees, and assessments? If so, which party bears the burden of proof regarding defendant's inability to pay?"].)

Here, we need not mire ourselves in the debate surrounding *Dueñas* or address the constitutional issues briefed by the parties. Gonzalez took advantage of the opportunity to show he was unable to pay the fines and fees by filing his section 1237.2 motion with supporting evidence. After “read[ing] and consider[ing]” the motion, the trial court denied it, implicitly finding he had the ability to pay. Thus, the only question we must decide is whether Gonzalez has shown on appeal this factual finding was erroneous. He has not.

We agree with the cases that place the burden on the defendant to demonstrate an inability to pay fines and fees. (*People v. Cowan* (2020) 47 Cal.App.5th 32, 49, review granted, June 17, 2020, S261952; *People v. Santos* (2019) 38 Cal.App.5th 923, 934; *People v. Kopp, supra*, 38 Cal.App.5th at p. 96; *People v. Castellano* (2019) 33 Cal.App.5th 485, 488–489.)³ In deciding ability to pay, the trial court looks to the defendant’s “‘present ability to pay,’” as well as future ability to pay. (*People v. Cowan, supra*, at p. 49; *People v. Santos, supra*, at p. 934; cf. § 1202.4, subd. (d) [“future earning capacity” relevant factor in considering defendant’s inability to pay restitution fine above statutory minimum].) Factors include “housing status, mental illness or disability, receipt of government benefits, and realistic ability to earn prison wages or obtain employment.” (*Santos, supra*, at p. 934.)

While we would normally review the factual determination of ability to pay for substantial evidence, “[i]n the case where the trier of fact has expressly or implicitly concluded that the party

³ As noted, the burden of proof issue is pending before our high court in *People v. Kopp, supra*.

with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment. . . . [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant’s evidence was (1) ‘uncontradicted and unimpeached’ and (2) ‘of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.’” (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1528.)

Gonzalez’s showing in the trial court did not compel a finding of inability to pay. At the time of his resentencing, he was 28 years old, and he presented no evidence that he suffered from any disability that would have prevented him from working. Appointed counsel represented him, but that did not show inability to pay the fines and fees. (See *People v. Douglas* (1995) 39 Cal.App.4th 1385, 1397 “[A] defendant may lack the ‘ability to pay’ the costs of court-appointed counsel yet have the ‘ability to pay’ a restitution fine.”).) While Gonzalez pointed out he had been unemployed and had lived with his parents prior to his conviction in 2017, that did not show he was *currently* indigent or unemployable or would be in the future. Indeed, he initially had a job in prison. He emphasizes that he could no longer work in prison because he was required to finish his GED. Even crediting this claim, he provided no details on when he would finish his classes and whether he could work once he was done.⁴ And if this

⁴ Respondent argues Gonzalez’s counsel’s declaration contained multiple levels of hearsay. We agree, but even taking

prevented him from working while he was taking classes, certainly his education would make him *more* employable in the future and *more* able to pay the fines and fees. This is not a case where the evidence left “ ‘no room for a judicial determination that it was insufficient to support a finding.’ ” (*In re I.W.*, *supra*, 180 Cal.App.4th at p. 1528.)

In his reply brief, Gonzalez shifts gears to contend the trial court violated due process by not holding an evidentiary *hearing* on his motion. One of the cases he cites—*People v. Cowan*—specifically held a hearing is not always required. In analyzing fines and fees under the excessive fines clauses in the state and federal constitutions, the court held that “a sentencing court may not impose court operations or facilities assessments or restitution fines without giving the defendant, on request, *an opportunity* to present evidence and argument why such monetary exactions exceed his ability to pay.” (*People v. Cowan*, *supra*, 47 Cal.App.5th at p. 48, italics added.) That opportunity need not be in the form of an evidentiary hearing: “Making an ability-to-pay record in the trial court need not entail a contested evidentiary hearing in every case. It can often be done by simple offer of proof. But it must be done where an excessive fines objection is interposed.” (*Id.* at pp. 48–49.) Here, Gonzalez’s motion was essentially an offer of proof, giving him a sufficient opportunity to show his inability to pay.

In any case, Gonzalez has not demonstrated what, if any, additional evidence he would have presented at a hearing that he did not present with his motion. Taken as true, his evidence was

the statements at face value, they don’t show Gonzalez was unable to pay his fines and fees.

insufficient to show his inability to pay the fines and fees, so the failure to hold an evidentiary hearing was harmless beyond a reasonable doubt. (See *People v. Jones* (2019) 36 Cal.App.5th 1028, 1035 [applying constitutional harmless error analysis to ability to pay claim].)

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

WE CONCUR:

STRATTON, J.

WILEY, J.